IN THE

Supreme Court of the United States

P. L. FLANIGAN,
Petitioner,

vs.

THE COUNTY OF SIERRA,
Respondent.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

The respondent is a county of the State of California and is a body politic and corporate under the laws thereof.

During the month of May, 1900, under and by virtue of that certain act entitled "An Act to establish a "uniform system of county and township govern- "ments" (Cal. Stats., 1897, Ch. CCLXXVII), commonly known as "The County Government Act," the Board of Supervisors of that county had power "To

" license for regulation and revenue, all and every " kind of business not prohibited by law, and trans- " acted and carried on in such county, and all shows, " exhibitions, and lawful games carried on therein, " to fix the rates of license tax upon the same, and " to provide for the collection of the same, by suit " or otherwise." (Sec. 25, subd. 25).

Upon the 31st day of May, 1900, the Board of Supervisors duly enacted an ordinance which is in part as follows:

" Section 1. Each and every person, co-partner- " ship, firm or corporation, engaged in the business " of raising, grazing, herding and pasturing sheep " in the County of Sierra, State of California, must " annually procure a license therefor from the " License Collector, and must pay therefor the sum " of ten (10) cents for each sheep or lamb owned by, " in the possession of, or under the control of such " person, co-partnership, firm or corporation, and " used in such business in said county.

" Section 2. Each and every person, co-partner- " ship, firm or corporation who may engage in the " business of raising, grazing, herding or pasturing " sheep within the County of Sierra, State of Cali- " fornia, in order to procure a license therefor, must " present to the License Collector of said county, at " the time of making application therefor, the affi- " davit of such owner, his foreman, agent or person " in charge of such sheep owned by and in the pos- " session of and under the control of such applicant

" for license within said county, and upon presenting " such affidavit and the payment of the license tax, " as prescribed in Section 1 of this ordinance, the " applicant shall be granted a license to raise, graze, " herd or pasture sheep within the said County of " Sierra. * * *

" Section 4. All licenses to be collected under " this ordinance are payable annually, and shall be- " come due and payable in advance at the office of " the License Collector, and if any license is not paid " within fifteen days after the commencement of said " business an additional tax of ten per cent is hereby " added, to be collected with the original " amount. * * *

" Section 7. The amount of the license tax fixed " by this ordinance for the transaction or carrying " on any business named herein shall be deemed a " debt due to the County of Sierra, and if any per- " son fails, neglects or refuses to take out and procure " a license issued under the provisions and in the " manner provided in this ordinance, the said License " Collector shall direct the District Attorney of said " county to bring suit in the name of the County of " Sierra for the recovery of such license * * * " and in case of recovery by the plaintiff fifty dollars " damages and costs must be added to the judgment " to be collected from the defendant.

" Section 8. The License Collector shall issue " licenses for the year in which said license is pro- " cured and out of each license collected by him he

" may retain for his fee therefor the sum of 10 per " cent thereof which said fee shall belong to " him. * * *

" Section 10. All money collected for licenses " under the provisions of this ordinance, less said fee " of 10 per cent, shall be paid over to the County " Treasurer, as other moneys are and be placed to " the credit of the general funds of the county."

The petitioner is a citizen of the State of Nevada, and during the months of May and June of the year 1900 was engaged in the business of raising, grazing, herding and pasturing sheep in the county of Sierra, and had in his possession and under his control some 25,000 sheep. He did not procure a license and did not pay the tax, as required by that ordinance.

An action under and by the authority of that ordinance, to recover the sum of $2,500 the amount of such unpaid tax and for the additional sum of $50 by way of damages was commenced upon the 25th day of June, 1900, in the Superior Court of the State of California, in and for the County of Sierra, by the respondent against the petitioner. That cause was afterwards duly removed to the United States Circuit Court, Ninth Circuit, Northern District of California.

On the 16th day of August, 1900, the defendant demurred to the complaint, which alleged substantially the facts hereinbefore set out, upon the ground that it did not state facts sufficient to constitute a cause of action against him.

By an act of the Legislature of the State of California, approved on the 23d day of March, 1901, (Cal.

Stats., 1900, Chap. CCIX, p. 635) there was added to the Political Code of the State of California a new section numbered 3366, which provided as follows:

"Boards of Supervisors of the counties of the "State, and the legislative bodies of the incorpo- "rated cities and towns therein, shall, in the exer- "cise of their police powers, and *for the purpose of* "*regulation,* as herein provided, *and not otherwise,* "have power to license all and every kind of busi- "ness not prohibited by law, and transacted and "carried on within the limits of their respective "jurisdictions, and all shows, exhibitions and law- "ful games carried on therein, to fix the rates of "license tax upon the same, and to provide for the "collection of the same by suit or otherwise."

Thereafter upon the demurrer it was contended that by reason of the repeal effected by the act of 1901, of the power to license for revenue conferred upon Boards of Supervisors by the County Government Act, the respondent could not maintain its action. But upon the 25th day of November, 1901, the Circuit Court overruled the demurrer with leave to defendant to answer within twenty days. The defendant did not so answer and judgment by default was entered against him as prayed for in the complaint.

Thereafter the defendant prosecuted a writ of error to the Circuit Court of Appeals, Ninth Circuit, to review such judgment, and upon the hearing thereof the judgment was affirmed.

The record and proceedings in that cause in the

Circuit Court of Appeals now come before this Court for review upon writ of certiorari.

ASSIGNMENT OF ERRORS.

I.

The complaint does not state facts sufficient to constitute a cause of action.

II.

The Circuit Court erred in making and entering its order whereby the demurrer to the complaint was overruled.

III.

The Circuit Court erred in giving, making and entering its judgment in favor of plaintiff and against defendant.

BRIEF OF ARGUMENT.

I.

The ordinance under which this action was commenced was repealed by the act of the Legislature of the State of California of March 23, 1901, and hence the action is abated.

II.

The ordinance is in conflict with the constitution of the State of California for (1) it imposes a double taxation; (2) it is not uniform in its operation and (3) it levies a tax without a prior assessment.

I.

The Ordinance under which this Action was Commenced was Repealed by the Act of the Legislature of the State of California of March 23, 1901, and Hence the Action is Abated.

The ordinance upon which this action is based is obviously enacted for the sole purpose of raising revenue, for in no respect does it purport to regulate the business of sheep raising. The mere word "license" has no talismanic power to change the nature of the ordinance; to make that regulatory which is fiscal;

to invoke the police power to sustain the enactment if the taxing power shall fail. Whether this ordinance be regulatory or fiscal, must be determined by an examination of the purposes and objects thereof, and not by its purported object.

Does the ordinance license the business of sheep raising? Most obviously it does not. What is a license? It is a special privilege to do an act or carry on a business, the performance of transaction of which without such permission is forbidden. The Supreme Court of California has said in *Sonora* vs. *Curtin* (137 Cal. 583): "A license in its proper sense is a permit to do business which could not be done without the license." Judge Cooley in his work on Taxation (p. 573) says: "A license is a right granted by some competent authority to do an act which, without such authority, would be illegal." In *Mayor* vs. *Charlton* (36 Ga. 460, 462) it is said: "A license confers a privilege, and makes the doing of something legal, which, if done without it, would be illegal."

And see:

Insurance Co. vs. *Augusta*, 50 Ga. 530.

Burch vs. *Savannah*, 42 Ga. 596.

Chilvers vs. *People*, 11 Mich. 43.

Robinson vs. *Mayor*, 1 Humph. 156.

Ould vs. *Richmond*, 23 Gratt. 464.

Reed vs. *Beall*, 42 Miss. 472.

The so-called "license" of the ordinance when so

tested is no license. It is but a tax receipt, and the so-called "license tax" merely a revenue tax. For the ordinance does not forbid or make illegal the carrying on of the business mentioned unless a license be procured; it does not require that a license be procured as a prerequisite to lawfully engaging in the business. Its only provision is that sheepmen "engaged in the business" shall pay an annual tax and procure a "license" and if they fail to do so, the amount of the tax, with certain added penalties, shall be a debt due the county. This tax is to be collected by a civil suit, and when recovered the defendant has a perfect right to continue in the business whether or not he procures the "license" mentioned in Section one. The permission which is the very essential and synonym of license, is not a prerequisite to engaging in the business; the only demand of the county is that the tax shall be paid. The effect of the ordinance is not otherwise than if it had provided that all sheep owned by those engaged in this business, should be taxed ten cents a head; that upon the payment of the tax the owner should be entitled to a tax receipt evidencing such payment, and that if it were not paid, it should become a debt due the county to be collected by a civil suit. Calling the tax receipt a "license" and the tax a "license tax" does not confine the lawful authority to transact this business to those who have paid the tax and procured the "license" any more than an ordinary tax on property creates a right or authority to own property. A license is a

police regulation controlling the exercise of a profession, business or occupation.

As was said by the Supreme Court of Utah in *Cache County* vs. *Jensen* (61 Pac. 303): "License, in com-
" mon parlance, implies permission to do something
" which may not be done without a license. * * *
" A mere tax imposed upon a business or occupation
" therefore, is not a license or privilege as to the busi-
" ness which would not otherwise exist. * * *
" Evidently the efforts of the Board resulted not in
" the imposition of a license upon a business, but in
" the levy of an unequal and unjust tax upon prop-
" erty. The thing provided for by this instrument is
" not a license * * * but by design a prohibitive
" tax."

In *Mayor* vs. *Second Avenue R. R.* (32 N. Y., 261), the Court say: "Regulations of police are regulations
" of internal or domestic government forbidding some
" things and enjoining the performance of others for
" the security and protection and to promote the hap-
" piness of the governed. The only act enjoined by
" the ordinance in question is the payment of the fifty
" dollars, and the only act which it forbids and pro-
" hibits is the running of the cars without the pay-
" ment of the money. If the Legislature should by
" law require every head of a family throughout the
" State to pay to the collector the sum of twenty dol-
" lars, and take his receipt therefor, it would be a
" fiscal measure, an expedient to replenish the treas-
" ury, not a regulation of police prescribing a rule of
" action and conduct. So with this ordinance, call

"what it requires by the name of license, or certifi-
"cate of payment, or anything else, its primary and
"indeed only purpose is to take from the company
"under coercion of the penalty which it imposes, the
"sum of fifty dollars annually for each car run upon
"the road, for the benefit of the city. The certificate
"which the company is to receive upon payment being
"made is called a license in the ordinance. * * *
"It is vain, therefore, to speak of it or treat it as a
"license, or a regulation of police. It is the imposi-
"tion of an annual tax upon the company."

The ordinance by its very terms is a fiscal, not a regulatory, measure. The moneys derived from the license tax are not used for the purpose of regulating or policing the business licensed, but, less the ten per cent deducted as the collector's fee, "*shall "be paid over to the County Treasury, as other "moneys are, and be placed to the credit of the gen-"eral fund of the county.*"

In *Mays* vs. *Cincinnati* (1 Ohio St. 268), the Court say: "A license may include a tax, or it may not. If "the exaction goes no further than to cover the neces-"sary expenses of issuing it, it does not, *but it is "made a means of supplying money for the public "treasury * * * that it is a tax is too palpable for "discussion.*"

In *American Fertilizing Co.* vs. *Board of Agriculture* (43 Fed. 609), the Circuit Court for the Eastern District of North Carolina say: "Defendants contend "that this taxation can be sustained as a part of the

"police power of the State. * * If the legislation "in question can properly be referred to that power, "it will be because the right to pass inspection laws "may be deemed to have its foundation in the police "power of a State. Certainly if it be anything but "what the act itself seems to contemplate—a tax on "an occupation, or a privilege tax—it is because it is "used to secure an inspection of commercial fertiliz- "ers before they can be sold in North Carolina. Such "a tax would be constitutional only within the limits "of the Constitution. It cannot be sustained where "evidently in excess of what is required for such pur- "pose, *and when the proceeds are applied to other "uses.*"

See, also,

Flanigan vs. *Plainfield*, 44 N. J. L., 118.

Cooley on Taxation, 597.

That the purpose of this ordinance is to provide revenue for the county in the same manner as the ordinary tax levy, to be paid into the county treasury "as other moneys are," and to be expended for the general purposes of the county, is too palpable to admit of discussion; and on the other hand in no manner does it regulate, even incidentally, the business which it purports to license.

The Supreme Court of Utah, in *Cache County* vs. *Jensen* (61 Pac. 303), construing an almost identical ordinance, say: "The ordinance does not even contain "a hint as to regulation of the business, nor that the "business requires any regulation, nor that the

"county will afford protection of any kind to the per-
"son engaged in the business, nor that it is of such a
"character as to require regulation or protection.
"The business may be conducted by those engaged
"therein where and how they will. No intention to
"regulate it is manifest from the context or otherwise.
"This ordinance imposes no restrictions as to the
"manner the business shall be carried on, and grants
"no lawful privilege that was not previously en-
"joyed."

The Supreme Court of California has said, in *Merced County* vs. *Helm* (102 Cal. 159, 163), in reference to an ordinance of similar character: "By its very "terms the ordinance is a revenue measure, and this "suit is simply a civil action to recover a liability al-"leged to have been incurred by the defendants by "virtue of the provisions of the ordinance, and the "collection of a tax does not come within the exercise "of police power as a prohibitory measure. That "power is exercised in the enforcement of a penalty "prescribed for a non-compliance with the law, or for "the doing of some prohibited act. As the county has "chosen by this ordinance to require a license tax for "engaging in certain kinds of business, and that this "tax shall be collected by a suit, and has fixed no pen-"alty for engaging in the business, the ordinance is "not to be regarded as the exercise of its police power, "but rather as its desire to regulate the business and "derive a revenue therefrom."

In Colorado, in *Kiowa County* vs. *Dunn* (40. Pac. 357) the Court say: "While a license tax may be

"levied upon such business or occupation as are "proper subjects of municipal regulation and control, "and the purpose of such tax is for regulation or re- "straint, yet, when all the elements of regulation or "restraint are wanting, and the primary purpose of "the act is the raising of revenue only, then it loses "its character as a license tax, and becomes a tax for "revenue. 'Only those cases where regulation is the "'primary purpose can be specially referred to the "'police power.' (Cooley on Taxation, 397.) For "this reason the act under consideration cannot be up- "held as a legitimate exercise of police power."

By the act of March 23, 1901 (Cal. Stats., 1900, Chap. CCIX, p. 635), there was added to the Political Code of California, a new section numbered 3366, which provides as follows:

"Boards of Supervisors of the counties of the State, "and the legislative bodies of the incorporated cities "and towns therein, shall, in the exercise of their "police powers, and *for the purpose of regulation*, as "herein provided, *and not otherwise*, have power to "license all and every kind of business not prohibited "by law, and transacted and carried on within the "limits of their respective jurisdictions, and all "shows, exhibitions and lawful games carried on "therein, to fix the rates of license tax upon the same, "and to provide for the collection of the same by suit "or otherwise."

In *Ex parte Pfirrmann* (134 Cal. 143), the Supreme Court of California say in part: "Prior to the act of

"1901, Boards of Supervisors, by virtue of sub-
"division 25 of Section 25 of the County Government
"Act, possessed the power to collect a license tax for
"revenue in all parts of the county. But the act of
"1901 must be held to repeal by implication, the power
"thus granted. The later act provides: 'Boards of
"'Supervisors * * * shall in the exercise of their
"'police powers, and for the purpose of regulation,
"'as herein provided, and not otherwise, have power
"'to license all and every kind of business,' etc. This
"language is too plain to be construed. It speaks for
"itself, and declares that Boards of Supervisors may
"issue licenses for the purpose of regulation alone.
"The words 'not otherwise' curtail and cut off all
"power Boards of Supervisors theretofore had to is-
"sue licenses and charge therefor as a revenue meas-
"ure."

This ordinance was enacted solely as a revenue measure. Under the law, as it stands to-day, the Board of Supervisors of the county appellant is divested of authority to enact the ordinance and it stands repealed.

In the case of *Sonora* vs. *Curtin* (137 Cal. 583) the Trustees of the City of Sonora had passed an ordinance on June 4, 1900, providing that any person engaged in any pursuit therein named, should obtain a license therefor; that attorneys-at-law should pay three dollars per quarter, and that "the license imposed thereunder" should be deemed a debt due the city payable in advance, and if such license should not

be paid it might be recovered in a civil action, with an additional penalty of ten dollars.

The same Court in part say: "Defendant was at "the time of the passage of the ordinance, an attor- "ney-at-law, admitted and licensed to practice in all "the Courts of the State, and he was then engaged, "and continued thereafter to be engaged in the prac- "tice of law in the City of Sonora within the territory "covered by said ordinance. He neglected and re- "fused to procure a license under said ordinance, or "to pay the license tax imposed by its terms.

"Plaintiff is a municipal corporation of the sixth "class incorporated under an Act of the Legislature "entitled, 'An Act to provide for the organization, in- "'corporation, and government of municipal corpora- "'tions,' approved March 13, 1883 (Stats., 1883, p. "93). The authority for passing the ordinance is "claimed under subdivision 10 of Section 852 of the "Act, which was in force at the time of its passage, "and which provides that Boards of Trustees of "Municipal Corporations of the sixth class shall have "power 'to license for purposes of regulation and "'revenue, and every kind of business authorized by "'law and transacted or carried on in such city or "'town * * * to fix the rates of license tax upon the "'same, and to provide for the collection of the same "'by suit or otherwise.' If it be conceded that the "practice of law is a 'business authorized by law and "'transacted or carried on in such city or town,'" "within the meaning of the statute, and that the pro- "vision, 'Every attorney-at-law shall pay a license of

"'three dollars a quarter,' is a provision for a license "tax upon the business of practicing law, and not "upon the person because he is an attorney-at-law, is "it a license tax imposed for the purpose of revenue, "or is it a regulation under the police powers of the "town? It is well settled that a business or occupa- "tion may be taxed, under authority to tax for the "purposes of revenue, and in such cases the tax is "properly a license tax. A license in its proper sense "is a permit to do business which could not be done "without the license. It is evident that the license "tax imposed by the ordinance in question is not a "license in the sense of a permit to defendant to prac- "tice law, because he already has a license, and has "paid the fee therefor, which permits him to practice "law. Although a business, occupation or profession "may be thus licensed, by having a license issued "which permits the business to be carried on, still it "may under a proper statute, be subject to an addi- "tional license tax. Now the defendant here having "obtained his license, which permits him to practice "law, the ordinance in question could not take away "that license or permit because of the refusal to pay "the license tax. The ordinance, therefore, plainly by "its terms imposed the charge as a license tax. It is "called in the ordinance a license tax, and it is therein "said the license tax shall be deemed a sum due the "city. The tax was not imposed as a police regula- "tion. A police regulation or restraint is for the pur- "pose of preventing damage to the public or to third "persons. * * *

"The Board of Trustees of a city * * * cannot "in any way or manner regulate the business or pro- "fession of practicing law. If it possessed any power "to pass the ordinance in question it was under the "power to license for the purpose of revenue. Since "the ordinance was passed, the Legislature, by "an Act approved March 23, 1901 (Statutes and "Amendments to the Codes, 1901, p. 635), added Sec- "tion 3366 to the Political Code, which so far as "material here, is as follows: 'Boards of Supervisors "'of the counties of this State, and the legislative "'bodies of the incorporated cities and towns therein, "'shall, in the exercise of their police powers, and for "'the purposes of regulation, as herein provided, and "'not otherwise, have power to license all and every "'kind of business not prohibited by law, and trans- "'acted and carried on within the limits of their re- "'spective jurisdictions * * * to fix the rates of "'license tax upon the same, and to provide for the "'collection of the same by suit or otherwise.' * * *

"The section of the Act of 1883 herein quoted giv- "ing to the Board of Trustees power to license for "purposes of revenue is repealed by implication by "said Section 3366 of the Political Code. It declares "and limits the power of the Board to license for the "purpose of regulation in the exercise of their police "powers. The words 'not otherwise' are used to "emphasize the meaning of the section. * * *

"The action is not to recover upon any contract "obligation. If recovery can be had, it is upon the "theory that defendant has violated the law. The

" violation of the law is measured in dollars, and the " amount for its violation is authorized to be recov- " ered in a civil action. The defendant does not owe " for any license, because he refused to take out a " license. The recovery is sought for his refusal. The " authority under which the ordinance for revenue " purposes was passed being repealed, the ordinance " is repealed as to all such purposes, and must be re- " garded as if it never existed, except for the purpose " of those actions which were commenced, prosecuted " and concluded while it was an existing law.

" The ordinance here in question provided that the " three dollars 'together with the sum of ten dollars " 'thereto added after the expiration of said ten days, " 'shall become in each and every instance of delin- " 'quency, as aforesaid, the license tax as imposed by " 'this ordinance.'

" The right is given by the ordinance to bring a " civil suit to recover the amount so made a license " tax. The civil remedy was created by the ordinance, " and the remedy is repealed by the repeal of the ordi- " nance as to revenue. * * * "

And again in *Santa Monica* vs. *Guidinger* (137 Cal. 658) the same Court say: " From the title of the " ordinance, the absence of regulatory provisions, the " amounts of the several taxes imposed, and the nature " of the particular subject of taxation involved here, it " is clear that the license tax in question was imposed " for the purpose of raising revenue. The case is " therefore substantially similar to that of the *City of* " *Sonora* vs. *Curtin* (*ante* p. 583), just decided, and it

" must therefore be held on the authority of the de-
" cision in that case that the license tax in question
" was repealed, and the right of action therefor ex-
" tinguished by Section 3366 of the Political Code."

But the Circuit Court of Appeals decided in diametric opposition to the Supreme Court of California, as to the effect of the enactment of the repealing act, upon the pending action. They say in part:

" *The Supreme Court of California has held that*
" *Section 3366 repeals, by implication, the prior act of*
" *1897, in so far as the same relates to the power to*
" *collect a license tax for revenue, thus restricting the*
" *licensing power of Boards of Supervisors, under the*
" *Act of 1897, to matters of regulation alone.* (*Ex*
" *parte Pfirrmann*, 134 Cal., 143, 147-8; *City of Sonora*
" vs. *Curtin*, 70 Pac., 674; *Town of Santa Monica* vs.
" *Guidinger*, 70 Pac., 732.)

" What effect does this repealing act have upon the
" present action which was brought under the provi-
" sions of the law of 1897, before it was repealed?

" Counsel for plaintiff in error contend, that inas-
" much the law under which the ordinance for revenue
" purposes was passed, has been repealed, the ordi-
" nance is repealed as to all such purposes, and must
" be regarded as if it never existed except for the pur-
" poses of those actions which were commenced, prose-
" cuted and concluded while it was existing law, and
" rely upon *the rule announced in many authorities,*
" *that where the right and remedy is given by statute*
" *to bring a civil action for the collection of a license*
" *tax, the repeal of the statute destroys the remedy*

" *unless the repealing statute contains a saving*
" *clause.* * * *

" This principle has been applied more frequently
" to penal statutes and it may be regarded as an es-
" tablished rule that the repeal of a penal statute
" without any saving clause has the effect to deprive
" the Court in which any prosecution under the
" statute is pending of all power to proceed further
" in the matter, and in such cases the proceeding
" will be arrested at the very point where it is at the
" time of the repeal, because: 'The repeal of the
" 'law imposing the penalty is of itself a remis-
" 'sion.'

" The ordinance under discussion was adopted
" May 31, 1900; it went into effect fifteen days there-
" after. This action was commenced June 25, 1900.
" The amendment to the Code, Section 3366, was
" approved March 23, 1901. The judgment in this
" case was entered March 7, 1902. Under these cir-
" cumstances does it necessarily follow that because
" a saving clause was not inserted, the act of 1901
" should be given a 'retrospective operation?' Does
" this question not depend upon the circumstances
" and conditions of each particular act, its nature
" and character? In the present case the transaction
" between the parties, under the ordinance of 1900,
" was closed; nothing was left to be done except to
" collect the license due which was authorized by law
" then in force. Upon the facts of this particular case
" can it be said that it was the intention of the Legis-
" lature by its passage of the act of 1901 to annihilate

"the cause of action provided for in the act of 1897,
"and terminate all pending suits for its enforcement,
"or was it simply to take away the power of the Board
"of Supervisors in the future to license for revenue
"only? * * *

"The defendant in error contends that the license
"fee or tax, after the preliminary steps taken for its
"collection, became a debt (and it is so expressly de-
"clared to be in the ordinance in question); and that
"it had a vested right to collect the same. It has
"frequently been held that a direct tax duly assessed
"and levied upon real or personal property, is not
"a debt within the broad meaning of that term. But
"a license fee or tax does not stand upon the same
"plane. It is true that a vested right is usually based
"upon contracts, but it may also be based upon trans-
"actions in the nature of a contract.

"In Sutherland on Stat. Const., Sec. 164, the au-
"thor said: 'When a right has arisen on a contract,
"'or a transaction in the nature of a contract au-
"'thorized by a statute, and has been so far perfected
"'that nothing remains to be done by the party as-
"'serting such right, the repeal of the statute will not
"'affect it or an action for its enforcement. It has
"'become a vested right which stands independently
"'of the statute.'"

It is submitted with all respect for the decision of the Circuit Court of Appeals, that it does not harmonize with the decisions of the Supreme Court of California and that while expressly recognizing the existence and effect of these decisions, it arrives at

a conclusion contradictory and antagonistic thereto, as may be readily seen by comparison.

Thus the Circuit Court of Appeals say: "This "principle has been applied more frequently to "penal statutes and it may be regarded as an estab- "lished rule that the repeal of a penal statute with- "out any saving clause has the effect to deprive the "court in which any prosecution under the statute is "pending of all power to proceed further."

And the Supreme Court say: "The right given "the plaintiff in this case, *being penal in its nature*, "and the remedy created solely by statute, its en- "forcement is dependent upon the statute alone. It "is still inchoate, and not reduced to possession nor "perfected by final judgment. In such case the re- "peal of the statute destroys the remedy unless the re- "pealing statute contains a saving clause."

And again the Circuit Court of Appeals say: "The defendant in error contends that the license "fee or tax, after the preliminary steps taken for its "collection, became a debt. * * * It is true "that a vested right is usually based upon contracts, "but it may also be based upon transactions in the na- "ture of a contract."

And the Supreme Court say: "The action is not "to recover upon any contract obligation. If recov- "ery can be had, it is upon the theory that defendant "has violated the law. The violation of the law is "measured in dollars, and the amount of its vio- "lation is authorized to be recovered in a civil ac- "tion. The defendant does not owe for any license,

"because he refused to take out a license. The re-
"covery is sought for his refusal."

The Circuit Court of Appeals held that "the trans-
"action between the parties, under the ordi-
"nance of 1900, was closed" and "nothing was left
"to be done except to collect the license due which
"was authorized by the law then in force," but in *Curtin's* case in just the same manner the transaction between the parties was closed and nothing left to be done except to collect the license due which was authorized by the law then in force. And the Supreme Court said that the ordinance *"must be re-
"garded as if it never existed, except for the purposes
"of those actions which were commenced, prosecut-
"ed and concluded while it was an existing law"* and that the right of plaintiff in that case was *"still in-
"choate and not reduced to possession nor perfected
"by final judgment."*

The Circuit Court of Appeals say: "The plaintiff
"in error did not directly promise to pay the license
"tax demanded by the defendant in error, but he
"herded and grazed his sheep in Sierra County
"when the law for the imposition and collection of
"the license tax was in full force and effect. He
"reaped the full benefit of the law, and then refused
"to comply with it." With respect to that Court it may be asked, What benefit did he reap? What benefit did the law confer on him? He was not accorded any protection or privilege thereby, which he did not have before its enactment. He could pay the tax and raise his sheep or he could raise his sheep

and pay the tax. No right or privilege to raise sheep is conferred by the ordinance. His privilege was unaltered by its enactment, except that he was obliged to pay a tax. He has reaped no benefit; the county has accorded him no rights; no question of reciprocal obligations can arise.

But in the *Curtin* and *Guidinger* cases it might equally well be said that the defendants had "reaped "the full benefit of the law." Curtin was engaged in his profession, Guidinger was acting as a laundry agent "when the law for the imposition and collec- "tion of the license was in full force and effect." They reaped no benefit; they acquired no rights; they merely contracted an obligation, and the sovereign power of the state released them therefrom before its payment.

The case of *City of Oakland* vs. *Whipple* (44 Cal., 303), cited by the Circuit Court of Appeals in its opinion, it is respectfully submitted, is not in point. That was an action to recover delinquent taxes, but the right to levy those taxes had not been repealed, The right thereto, it is true, was founded solely on statute, but that statute was still in existence. The action was instituted under the provisions of the law then in force. (Cal. Stats., 1861, p. 419, Secs. 34-48.) While that action was pending a statute was enacted that before a certain date in each year the tax collector should complete and publish the delinquent list and then should proceed to collect the delinquent taxes. The defendant contended that the law under which that action was commenced was repealed and

the plaintiff could not maintain its action. And the Court said, as cited by the Circuit Court of Appeals, "To hold that the act was intended to have a retrospective operation, so as to affect taxes which had already become due, would be to hold that the Legislature intended to remit all those taxes. A result so manifestly incompatible with the plainest provisions of the Constitution, would not be inferred, but must be made apparent by clear and unequivocal language. That construction is not necessary in order to give full effect to the Act, and in our opinion it was not intended that the Act should have a retrospective operation; but the intent was that the taxes then due should be collected according to the law then in force." There was no contention that the tax obligation had been remitted by the repeal—only that the law imposed certain conditions in the matter of preparation and publication of the delinquent list, precedent to the maintenance of the action and that by expiration of time within which those conditions could be performed as to the taxes of the prior year, the right to maintain the action was lost. But the Court said the statute is not retroactive; the action is to be prosecuted according to the law as it existed at the time of its institution. That case goes only to the effect of a repeal of a rule of procedure, not to the effect of the repeal of a right or remedy created and existing solely by statute. The language of the Court: "The taxes "then due should be collected according to the law "then in force" relates only to the *manner* of their

collection, not to the *right* of collection, for the right had not been repealed and was still in force.

But even if the effect of this decision were such as the Circuit Court of Appeals has held, at least so far as it affects license taxes for revenue, it has been overruled by the cases last cited.

It is submitted that irrespective of the decisions of the courts of other states and of their rulings on the effect of similar statutes, the decisions of the Supreme Court of California in the construction of a statute of that state must be read into that statute and conclusively control the Federal Courts in their determination of its object and effect.

Brown vs. *New Jersey*, 175 U. S., 172.

Noble vs. *Mitchell*, 164 U. S., 367.

Illinois Cent. R. Co. vs. *Illinois*, 163 U. S., 142.

New York L. E. & W. R. Co. vs. Pennsylvania, 158 U. S., 431.

Leeper vs. *Texas*, 139 U. S., 462.

Missouri, K. & T. Ry. Co. vs. *McCann*, 174 U. S., 580.

Cravens vs. *N. Y. Life Ins. Co.*, 178 U. S., 389.

Morley vs. *Lake Shore & M. S. Ry. Co.*, 146 U. S., 162.

Lapp vs. *Ritter*, 88 Fed., 108.

Southern Ry. Co. vs. North Carolina Corp. Comm., 99 Fed., 102.

Mr. Justice Harlan, said when on circuit in *O'Brien* vs. *Wheelock* (95 Fed., 883, 905): "The

"federal courts, for the sake of harmony and to avoid "confusion, should 'lean towards an agreement of "'views with the state courts, if the question seems "'to them balanced with doubt,' and endeavor to "avoid 'any unseemly conflict with the well-consid- "'ered decisions of the state courts' upon questions "of local law. These considerations have peculiar, "if not controlling weight, when the question to be "determined relates to the jurisdiction or power, "under the fundamental law of a state, of tribunals "or bodies created by legislative enactment, and "charged with the performance of public duties."

II.

The Ordinance is in Conflict with the Constitution of the State of California for (1) it Imposes a Double Taxation; (2) it is not Uniform in its Operation and (3) it Levies a Tax without a Prior Assessment.

In the argument of our last point we have shown that the only effect of the ordinance is to tax—that it is a fiscal measure. We will now consider what is taxed—the business of sheep-raising, or the sheep themselves.

"The substance, and not the form of the tax is to be regarded in ascertaining whether the tax is upon the property or upon a privilege connected therewith." (Burroughs on Taxation, 69.) We believe that a mere casual examination of the ordinance will make it ap-

parent that the tax is on the animals, not on the business. "Every person * * * engaged in the busi- "ness," the ordinance reads, "must annually procure "a license therefor from the license collector, and "must pay therefor the sum of ten cents for each "sheep or lamb." That is to say, every person may procure this license, which does not license—this tax receipt—by paying to the license collector a tax, not on his business, nor on the privilege of conducting it, but on the sheep.

This proposition has been directly decided in Louisiana in *Police Jury* vs. *Nougues* (11 La. Ann. 739). In that case it is said: "The ordinance in question * * * "and the provisions material to the present case are "these:

"'Resolved, that the rate of taxes for licenses on "'professions and occupations for the year 1856 be as "'follows:

"'On each and every person keeping a dairy within "'the limits comprised between the upper line of this "'parish and Verret avenue a yearly tax of two dol- "'lars for each and every cow, payable semi-annually "'and in advance, $2.00 per cow.' * * *

"Dairyman may * * * under the Act of March "15, 1855, be taxed by the police jury of the right bank "of the parish of Orleans. But the tax must be levied "on all dairymen. Now, the ordinance under examina- "tion, while professing to tax the occupation, really "imposes a tax upon cows kept by dairymen within "certain limits on the right bank of the river in the

" parish of Orleans. The tax is two dollars per " cow. * * * Considering it in that light it is equally " inconsistent with a just interpretation of the statute " which conferred the power of taxation upon the " plaintiffs. It is not a tax upon personal property " to be preceded by an assessment, nor even on all " cows kept by certain individuals, whilst other in- " dividuals may keep cows without taxation. This is " not only repugnant to the fundamental principles of " equality which govern the exercise of the taxing " power by the State, but was evidently not within the " scope of the authority attempted to be conferred by " the legislature upon the police jury of the right " bank."

And see

State vs. *Endom*, 23 La. Ann., 663.

Brookfield vs. *Tooey*, 43 S. W. 387.

(1). The Constitution of California (Art. XIII, Sec. 1) provides that "all property in the State * * * shall " be taxed in proportion to its value," that is, the burden of taxation shall fall upon each article of property in the proportion of its value to the value of the entire property of the county. It follows, if after a general tax has been levied, a special additional tax be placed upon certain property, that it is taxed in excess of its proportion and is unduly burdened.

As was said in *Burke* vs. *Badlam* (57 Cal. 594, 600): " The Constitution of the State does not require or " authorize double taxation. On the contrary, its " language clearly forbids it. Thus: " 'All property

"'in the State, not exempt under the laws of the "'United States, shall be taxed in proportion to its "'value, to be ascertained as provided by law' (Sec. 1, " Art. XIII). To tax a portion of the property more " than once would certainly not be taxing all of it in " proportion to its value."

The right of the county to levy and collect taxes arises under Article XI, Section 12, of the Constitution of California: "The legislature * * * may by general " laws vest in the corporate authorities thereof the " power to assess and collect taxes for such (county) " purposes."

The County Government Act (Cal. St. 1883, p. 299, Sec. 4) renders this constitutional provision effective: " It has power * * * to levy and collect such taxes, " for purposes under its exclusive jurisdiction, as are " authorized by law."

The county has only such power of taxation as is conferred by the legislature. It is axiomatic that the legislature can confer no power on the county to levy a tax which itself could not have levied. The sheep within the county have already been assessed and taxed for the purposes of raising a county revenue. This ordinance imposes an additional tax for an identical purpose, and is clearly within the constitutional provision. As was said in *Cache County* vs. *Jensen*, "The " efforts of the Board resulted, not in the imposition of " a license upon a business, but in the levy of an un- " equal and unjust tax upon property."

What constitutes a double taxation is well defined

by Judge Cooley in his work on Taxation (p. 225): "There is a sense, however, in which duplicate taxation may be understood, and which we think is the proper sense, which would render it wholly inadmissible under any constitution requiring equality and uniformity in taxation. By duplicate taxation in this sense is understood the requirement that one person or any one subject of taxation shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute once."

Truly the magic of a word will not avail to change the nature of this tax, nor will a verbal subterfuge enable a county to impose an unconstitutional tax.

(2). A county ordinance is a law of the State (*In re Lawrence*, 69 Cal. 608, 611; *Ex parte Christensen*, 85 Cal. 208, 211; *Murray* vs. *Charleston*, 96 U. S. 432, 440). The taxing power of the county is the delegated power of the State (*United States* vs. *New Orleans*, 98 U. S. 381, 392; *Meriwether* vs. *Garrett*, 102 U. S. 472). Therefore the mandate of the Constitution of California (Art. I, Sec. 11) that all laws of a general nature shall have a uniform operation applies to county ordinances. Unless such an ordinance have a uniform operation it is invalid. (*Ex parte Bohen*, 115 Cal. 372.)

But the ordinance at bar has not a uniform operation. In the first place only the sheep used in the business named therein, not all the sheep in the county, are taxed. Such legislation imposes a tax

upon the sheep of one man and not upon those of another. The butcher's sheep are not taxed, nor are those owned by the farmer and kept for his own consumption.

In the second place, the tax is specific, not *ad valorem*. The same tax is placed upon sheep of one breed as upon those of another. The same tax is placed on lambs as on sheep. The same tax is levied one year with another, irrespective of the fluctuations of the market. Such taxation is not uniform, nor does it conform to the constitutional requirement that all property shall be taxed in proportion to its value.

In the third place the ordinance is class legislation. While we grant that a law is uniform and general that applies solely to a general class, so long as it includes the whole of that class, yet we submit that the selection of that class cannot be arbitrary. The propriety of the limitation is to be judged by the object sought to be attained, by the law.

We have already seen that this ordinance has been enacted under the taxing, not the police power—that its object is to raise revenue, not to regulate a business. While a class defined under the latter power may be reasonable, yet its selection under the former may be highly arbitrary. For instance, if a county ordinance should require as a condition precedent to the right of keeping dogs within the limits of towns, that their owners should take out a license and pay a tax thereon, that would be a valid exercise of the police power, and while the ordinance would affect only certain owners of dogs, yet, its object being to regulate

the keeping of dogs, under conditions which especially demand such regulation, the definition of the class would be reasonable. But if the ordinance should impose a tax on all dogs within town limits and should exempt those without, its object being to raise revenue, the definition of the class would be highly arbitrary and void.

So we claim that the definition of sheep-raisers as a separate class to bear the burden of taxation is highly arbitrary. Had the object of the ordinance been to regulate the raising and pasturing of sheep, this definition of a class might be reasonable. But the selection, for the purpose of taxation, of sheep-raisers out of all the raisers of livestock and of all owners of sheep only those engaged in the business of raising, grazing, herding and pasturing them, is arbitrary. The class is too limited and is not inclusive of all who should pay such a tax. The ordinance imposes an unequal, unfair and undue burden upon the sheep-raiser, and is therefore void.

A law which does not include all the individuals constituting a class has not a uniform operation. When a class has not been defined in the exercise of a sound reason therefor, a law, though including every individual of that class, has not a uniform operation.

"A law may be general in its terms and apply to a "class constituted by having characteristics which "make it a class and yet be an illusory classification "which will not warrant legislation confined to it, "where special or local legislation is prohibited. *The "grouping must be founded on peculiarities requiring*

"*legislation, and legislation which by reason of the* "*absence of such peculiarities is not necessary or* "*applicable outside of that class.* In other words, the "true principle requires something more than a mere "designation by such characteristics as will serve to "classify, for the characteristics which will thus serve "as a basis of classification must be of such a nature "as to mark the objects so designated as peculiarly "requiring legislation. *There must be a substantial* "*distinction, having a reference to the subject-matter* "*of the proposed legislation between the objects or* "*places embraced in such legislation and the objects* "*or places excluded.* The marks of distinction on "which the classification is founded must be such, in "the nature of things, as will in some reasonable de- "gree at least account for and justify the restriction "of the legislature."

Sutherland, Stat. Constr., Sec. 127.

In *Hammer* vs. *State* (44 N. J. L. 667), it is said: "Distinctions which do not arise from substantial dif- "ferences—differences so marked as to call for sepa- "rate legislation—constitute no grounds for support- "ing such legislation."

In *Dibrell* vs. *Lanier* (89 Tenn. 500), it is said: "Whether a statute be public or private, general or "special in form, if it attempts to create distinctions "and classifications between the citizens of this State, "the basis of such classification must be natural and "not arbitrary. * * * If the classification is made "under Art. I, Sec. 8, of the Constitution for the pur-

" pose of subjecting a class to the burden of some spe-
" cial disability, duty or obligation, there must be
" some good and valid reason why that particular
" class alone be subjected to the burden."

In *Pasadena* vs. *Stinson* (91 Cal. 238, 251), the Court say: "The conclusion is that, although a law is gen-
" eral and constitutional, when it applies equally to
" all persons embraced in a class founded upon some
" natural or intrinsic or constitutional distinction, it
" is not general or constitutional if it confers partic-
" ular privileges or imposes peculiar disabilities or
" burdensome conditions in the exercise of a common
" right upon a class of persons arbitrarily selected
" from the general body of those who stand in pre-
" cisely the same relation to the subject of the law."

And also see:

Kansas City vs. *Griesh*, 52 S. W. Rep. 286;

Darcy vs. *San Jose*, 104 Cal. 642;

Ex Parte Jentzsch, 112 Cal. 468;

Sutton vs. *State*, 33 L. R. A. 589;

Ex Parte Westerfield, 55 Cal. 550;

Re Garrabad, 19 L. R. A. 858;

Demoville vs. *Davidson*, 87 Tenn. 214;

Ill. C. R. Co. vs. *Crider*, 91 Tenn. 490;

Ragio vs. *State*, 86 Tenn. 272;

St. Louis vs. *Spiegel*, 90 Mo. 587;

In re Eight-Hour Law, 39 Pac. Rep. 328; 20 Colo. 279;

Tacoma vs. *Krech*, 46 Pac. Rep. 255; 15 Wash. 296.

State vs. *Allen*, 94 Tenn. 674;

Daly vs. *State*, 13 Lea. 232;

State vs. *Hammer*, 42 N. J. L. 435, 440;

Van Riper vs. *Parsons*, 40 N. J. L. 123;

Rutgers vs. *New Brunswick*, 42 N. J. L. 51.

In concluding this point we cannot do better than to quote further from the case of *Cache County* vs. *Jensen*, *supra*, a case on all fours with the case at bar, and to which, in its entirety, we most earnestly desire to call the Court's attention:

"Sheep-raising is one of the chief industries of this "commonwealth, and there appears to be no other "known use to which the vast areas of our western "desert lands can be so profitably put. The business "does not belong to that class of occupations which "are demoralizing in their tendencies. It is useful, "commendable and ancient as civilization itself. From "time immemorial it has been regarded as indispen-"sable to the comfort of the public. Why then single "out this particular business to burden it with a tax "which, under existing conditions, must be regarded "as prohibitory, and permit the raising of cattle and "horses and every other occupation to be carried on "without license? Counsel for the respondent sug-"gests that the business of sheep-raising needs some "degree of regulation, and doubtless this is true; for "where large bands of sheep are herded, the public "welfare, in all probability, requires that there be

" regulations and protection, but the answer to the " suggestion is that the ordinance provides for neither. " If it had been designed to regulate and protect, it " would possess some merit, but it was manifestly in- " tended for no such purpose. Whatever may have " been the intention of the Board of Commissioners, " their enactment is one for revenue only, and it is so " unequal and oppressive that it cannot be upheld. The " fee enacted is a tax, and not a license, and if the " power thus attempted to be exercised were to be " sanctioned, it is perceived that regulation would not " long be necessary; for the tendency would be to " drive the business out of the county and out of the " State, if the other counties would follow the example " and exercise the power."

But even if it should be held that the tax is imposed upon the business, not upon the animals, still it is not uniform.

As we said in *State* vs. *Endom* (23 La. Ann. 663): " It is contended by the defendant that this is a direct " and specific tax on the articles enumerated, while the " attorney for the State insists that it is a *license* for " the exercise of an occupation or trade. It is called " a *license* at the beginning of Section 3, and that sec- " tion is in that part of the law relating to persons, " trades, professions and occupations subject to tax- " ation. On the other hand, from the terms of the law, " the license is to be levied and collected from the " *objects* enumerated. But it is immaterial whether " it be a specific tax, or tax on trades, occupations, etc. " In either case it violates the Constitution. It was

"no doubt intended to be a tax on occupations or "trades. In that event it is a license for the right "or privilege to pursue the several callings taxed, "and the tax for this privilege must be *the same* for "all persons who engage in the business, without ref- "erence to the amount of capital invested or business "done. If A keeps one dray and B keeps two drays, "they both follow the same occupation or business, "and it would be unequal to tax one more than the "other for the privilege of engaging in it. To do so "would be not to tax the business, but the drays owned "by each."

And again it is said in *New Orleans* vs. *Ins. Co.* (23 La. Ann. 449): "The Constitution requires that a "license tax, as well as a tax on property, shall be "equal and uniform. To be equal and uniform the "tax imposed must be the same upon all who engage "in the particular profession or calling taxed without "reference to the abilities, fortunes, or successes of "those engaging in the business taxed."

See also Hilliard on Taxation, p. 32.

It may be contended that the privilege of pursuing the "licensed" business or occupation is a property right and as such it must be taxed in proportion to the value of the business. But even so the ordinance is invalid, for the business is not taxed proportionately to its value. The value of a business is not to be measured by the value of the stock on hand, but by its profits. It is evident that the value of the business of an agistor pasturing one thousand head of sheep on

contract, is not the same as that of a stockraiser feeding a similar number for market, yet by this ordinance they are equally taxed. The tax is levied quite irrespective of the ownership of the sheep "used in the "business," and of the profits and value of the business.

(3). Section 1 of Article XIII of the Constitution of California provides that, "All property in the State "not exempt under the laws of the United States shall "be taxed in proportion to its value, to be ascertained "as provided by law." Section 3627 of the Political Code provides that, "All taxable property must be "assessed at its full cash value."

The ordinance provides for no assessment, but imposes a specific tax of ten cents per head.

In the premises it is respectfully submitted that the judgment of the Circuit Court be reversed.

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Office Supreme Court U. S.
FILED
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 121.

P. L. FLANIGAN, PETITIONER,

vs.

THE COUNTY OF SIERRA, RESPONDENT.

Upon the point that the repeal of a statute without a saving clause abates all suits pending under the provisions of the statute repealed, counsel for the petitioner refers to the following authorities additional to those cited in the printed brief:

Garrison *vs.* City of New York, 21 Wall. 196.
Louisiana ex rel. *vs.* New Orleans, 109 U. S. 285.
Freeland *vs.* Williams, 131 U. S. 417.
United States *vs.* Tynen, 11 Wall. 88.
Norris *vs.* Crocker et al., 13 How. 429.
State of Maryland, Use, etc., *vs.* B. & O. R. R. Co., 3 How. 534.

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